

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

Nos. CIV 15-0860 JB/CG
CR 11-2002 JB

RAFAEL GOXCON-CHAGAL,

Defendant/Petitioner.

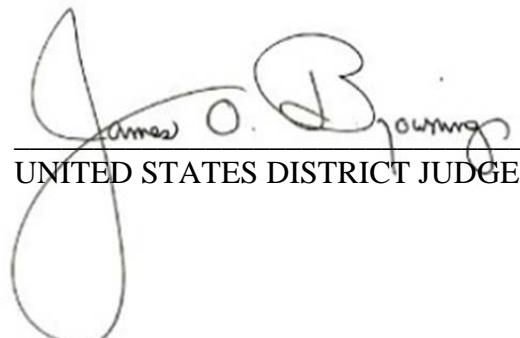
MEMORANDUM OPINION AND ORDER OF DISMISSAL WITHOUT PREJUDICE

THIS MATTER comes before the Court on Defendant/Petitioner's Notice of Withdrawal of his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, filed November 5, 2015 (Doc. 9) ("Motion to Withdraw"). Defendant/Petitioner Rafael Goxcon-Chagal states that he "did not understand the law at the time of sentencing and [n]ow understand[s] that his Attorney did her best for a plea agreement which includes a specific sentence of 90 months." Motion to Withdraw at 1. According to Goxcon-Chagal's Motion to Withdraw, his § "2255 Motion is respectfully withdraw[n] and an evidentiary hearing [is] not necessary." Motion to Withdraw at 1.

Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure provides that a "plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A). Plaintiff/Respondent the United States of America filed the United States' Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 on October 22, 2015 (Doc. 6), and, therefore, the present action "may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

The United States' response to Goxcon-Chagal's Motion to Withdraw was due on November 23, 2015. See D.N.M.LR-Civ. 7.4(a) ("A response must be served and filed within fourteen (14) calendar days after service of the motion" and this time period is "computed in accordance with Fed. R. Civ. P. 6(a) and (d)."). See also Fed. R. Civ. P. 6(d) (adding three days when service is made under Rule 5(b)(2)(C), (D), (E), or (F)); Fed. R. Civ. P. 6(a)(1) (providing that, when "the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday"). The United States has failed to file a response to Goxcon-Chagal's Motion to Withdraw and, therefore, is deemed to have consented to the granting of the Motion to Withdraw. See D.N.M.LR-Civ. 7.1(b). The Court will therefore grant Goxcon-Chagal's request to withdraw his Motion to Vacate, Set Aside, or Correct Sentence and dismiss the action without prejudice. See Fed. R. Civ. P. 41(a)(2).

IT IS ORDERED that: (i) Goxcon-Chagal's request to withdraw his Motion to Vacate, Set Aside, or Correct Sentence, filed November 5, 2015 (Doc. 9), is granted; and (ii) his Motion to Vacate, Set Aside, or Correct Sentence, filed September 25, 2015 (Doc. 1), is dismissed without prejudice; and (iii) judgment is entered.



James O.B. Young
UNITED STATES DISTRICT JUDGE

Parties and Counsel:

Rafael Goxcon-Chagal
Atwater, California

Plaintiff pro se

Damon P. Martinez
United States Attorney
Samuel A. Hurtado
Assistant United States Attorney
Albuquerque, New Mexico

Attorneys for the United States